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No. 80-1749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION and
JAMES B. EDWARDS, Secretary of Energy,
Appellants

v.

THE STATE OF MISSISSIPPI, *et al.*,
Appellees

On Appeal from the United States District Court for the Southern District of Mississippi

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BRIEF AMICUS CURIAE OF THE AMERICAN PUBLIC POWER ASSOCIATION

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.*
KIRK HOWARD BETTS
Watergate 600 Building
Washington, D.C. 20037
(202) 342-0800

Attorneys for Amicus Curiae

*Counsel of Record

ALAN H. RICHARDSON
American Public Power Association
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 342-7200

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QUESTION PRESENTED

Whether retail sales of electricity and natural gas to local consumers affect interstate commerce in the constitutional sense, and, if so, whether the Tenth Amendment nevertheless precludes (1) federal displacement of state regulatory policies with respect to such sales, and (2) federal regulation of states or their political subdivisions engaged in the generation or distribution of electricity or distribution of natural gas?[1]

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[1] Although the Act speaks in terms of "regulated" and "nonregulated" utilities, the latter expression is inaccurate shorthand for "utilities owned and operated by states or their political subdivisions." Their rates are determined by officials and governing bodies executing powers delegated by the state, but not by the same utility commissions that determine rates charged by investor-owned power systems. There is no such thing as a truly "nonregulated" utility. The rates charged by rural electric cooperatives, when not subject to state regulation, are subject to approval by the federal Rural Electrification Administration.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. RETAIL SALES OF ELECTRICITY AND NATURAL GAS TO LOCAL CONSUMERS DO NOT AFFECT INTERSTATE COMMERCE IN THE CONSTITUTIONAL SENSE	7
II. THE TENTH AMENDMENT PRECLUDES THE FEDERAL GOVERNMENT FROM DISPLACING STATE POLICIES WITH RESPECT TO RATEMAKING FOR RETAIL SALES OF ELECTRICITY, AND REGULATING STATES OR THEIR POLITICAL SUBDIVISIONS ENGAGED IN THE DISTRIBUTION OF ELECTRICITY AND NATURAL GAS TO LOCAL CONSUMERS	20
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:

Re Appalachian Power Co., PUR 1919D, 286 (W.Va. P.S.C. 1919) 15

Broad River Power Co. v. *Query*, 288 U.S. 178 (1933) . 15

Connecticut Power & Light Co. v. *Federal Power Commission*, 324 U.S. 515 (1945) 28

East Ohio Gas Co. v. *Tax Commission*, 283 U.S. 465 (1931) 12, 16

Federal Power Commission v. *East Ohio Gas Co.*, 338 U.S. 464 (1950) 16

Federal Power Commission v. *Hope Natural Gas Co.*, 331 U.S. 682 (1944) 28

FPC v. *Southern California Edison Co.*, 376 U.S. 205 (1964) 14, 28

Fry v. *United States*, 421 U.S. 542 (1975) 7

Table of Authorities Continued

Page

Gibbons v. *Ogden*, 9 Wheat. (22 U.S.) 1 (1824) 8, 9, 10

Heart of Atlanta Motel v. *United States*, 379 U.S. 241 (1964) 16, 17

Hodel v. *Virginia Surface Mining and Reclamation Association, Inc.*, —— U.S. ——, 49 U.S.L.W. 4654 (1981) 17, 23, 25, 27

Interstate Natural Gas Co. v. *Federal Power Commission*, 331 U.S. 682 (1947) 28

Katzenbach v. *McClung*, 379 U.S. 294 (1964) 17, 19

Leary v. *United States*, 395 U.S. 6 (1969) 21

Maryland v. *Wirtz*, 392 U.S. 183 (1968) 22, 23

McCulloch v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819). 9

Missouri ex rel. Barrett v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924) 11, 12, 13, 14, 16

National League of Cities v. *Usery*, 426 U.S. 833 (1976) 21, 23, 24, 28

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 22

Panhandle Eastern Pipe Line Co. v. *Public Service Commission*, 332 U.S. 507 (1947) 27-28

Pennsylvania Gas Co. v. *Public Service Commission*, 252 U.S. 23 (1920) 11, 12, 13, 15

Public Utilities Commission v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) 12, 13, 14

Public Utilities Commission v. *Landon*, 249 U.S. 236 (1919) 10, 11, 12, 14, 15, 16

Public Utilities Comission v. *United Fuel Gas Co.*, 317 U.S. 456 (1943) 28

Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 21, 22

South Carolina Power Co. v. *South Carolina Tax Commission*, 52 F.2d 515 (E.D.S.C. 1931), *affirmed* 286 U.S. 525 (1932) 15

Table of Authorities Continued

Page

South Carolina Power Co. v. *South Carolina Tax Commission*, 60 F.2d 528 (E.D.S.C. 1932) 15

State v. *Flannelly*, 96 Kan. 372, 152 P. 22 (1915) 15

State Tax on Railway Gross Receipts, 15 Wall. (82 U.S.) 284 (1873) 8

United States v *Jackson*, 390 U.S. 570 (1968) 21

United tSates v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942) 17

Washington Water Power Co. v. *Montana Power Co.*, PUR 1916 E, 144 (Idaho P.U.C. 1916) 15

West Virginia and Maryland Gas Co. v. *Towers*, 134 Md. 137, 106 A. 265 (1919) 15

Wickard v. *Filburn*, 317 U.S. 111 (1942) 8, 16

CONSTITUTION AND STATUTES:

United States Constitution:

Article I, § 8, Clause 3 (Commerce Clause) .... *passim*

Fifth Amendment 2, 21, 24

Sixth Amendment 2, 21

Tenth Amendment 6, 20, 21, 23, 24, 25, 30

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 23

Federal Power Act of 1935, 49 Stat. 847 *et seq.* .. 2, 5, 10, 13

Natural Gas Act, Pub. L. No. 323, 52 Stat. 821 *et seq.* .. 3, 5, 10, 13

Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 *et seq.* 20

Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.* ..... *passim*

Title I, 16 U.S.C. (Supp. III) § 2601 *et seq.*:

Section 2, 16 U.S.C. (Supp. III) § 2602 ..... 3, 18

Section 101, 16 U.S.C. (Supp. III) § 2611 3

Section 111, 16 U.S.C. (Supp. III) § 2621 27

Table of Authorities Continued

Page

Section 111(a), 16 U.S.C. (Supp. III) § 2621(a) . 3, 25, 28
Section 111(b), 16 U.S.C. (Supp. III) § 2621(b) . 25
Section 111(c), 16 U.S.C. (Supp. III) § 2621(c) . 4
Section 111(d), 16 U.S.C. (Supp. III) § 2621(d) . 3
Section 113, 16 U.S.C. (Supp. III) § 2623 27
Section 113(a), 16 U.S.C. (Supp. III) § 2623(a) . 4
Section 113(b), 16 U.S.C. (Supp. III) § 2623(b) . 3, 4, 25, 29
Section 113(c), 16 U.S.C. (Supp. III) § 2623(c) . 25
Section 114, 16 U.S.C. (Supp. III) § 2624 27
Section 115, 16 U.S.C. (Supp. III) § 2625 4
Section 116, 16 U.S.C. (Supp. III) § 2626 27
Section 122, 16 U.S.C. (Supp. III) § 2632 25
Section 123(c), 16 U.S.C. (Supp. III) § 2633 .... 4, 26
Section 133, 16 U.S.C. (Supp. III) § 2643 27

Title II, 16 U.S.C. (Supp. III) § 796 *et seq.*:
Section 210(f), 16 U.S.C. (Supp. III) § 824a-3(f). 2, 4

Title III, 15 U.S.C. (Supp. III) § 3201 *et seq.*: .
Section 303(a), 15 U.S.C. (Supp. III) § 3203(a) .. 4, 25, 29
Section 303(c), 15 U.S.C. (Supp. III) § 3203(c) .. 25
Section 304, 15 U.S.C. (Supp. III) § 3204 5

MISCELLANEOUS:

Congressional Materials:

COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES, NATIONAL ENERGY ACT, H.R. Doc. 95-138, 95th Cong., 1st Sess. (1977) 17

National Energy Act: House Hearings on H.R. 6831 et al. before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. (Part 3.2) (1977) 19

Table of Authorities Continued

Page

Public Utility Rate Proposals of President Carter's Energy Program: Hearings on S. 122 et al. before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess. (Part I) (1977) 18, 20

H.R. 6831, 95th Cong., 1st Sess. (1977) 17

S. 1469, 95th Cong., 1st Sess. (1977) 18

H.R. Rep. No. 95-496, Part IV, 95th Cong., 1st Sess. (1977) 20

S. Rep. No. 95-361, 95th Cong., 1st Sess. (1977) ... 20

123 Cong. Rec. 32411 (1977) 26

Other Materials:

Congressional Research Service, The Constitution of the United States of America—Analysis and Interpretation (1973) 22

V. Lindsley, Rate Regulation of Gas and Electric Lighting (1906) 27

The Federalist No 46 (J. Madison) 9, 10

F. Ribble, State and National Power Over Commerce (1937) 29

Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harvard L. Rev. 1 (1959) 8

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BRIEF AMICUS CURIAE OF THE AMERICAN PUBLIC POWER ASSOCIATION

The American Public Power Association (hereinafter "APPA") files this brief as *amicus curiae* in support of the Appellees. Counsel for all parties have consented to the filing of this brief, and their consents have been filed with the Clerk of the Court.

INTEREST OF AMICUS

APPA is a national service organization representing over 1,750 local public power systems throughout the United States. Most of these power systems are owned and operated by political subdivisions of the states. No public power systems participated in this case at the district court level, and it is thus understandable that the district court decision addresses only the impact of the Public Utility Regulatory Policies Act (hereinafter "PURPA" or "the Act") on state commissions. However,

all APPA member systems are, to some extent, affected by PURPA.

The larger public power systems—those having annual retail sales in excess of 500 million kilowatt-hours—are subject to Title I of PURPA. These systems, approximately 75 in number, have already expended several million dollars to comply with the requirements of Title I, and anticipate spending additional millions of dollars in the years ahead if they continue to be subjected to the burdens of the Act.

All public power systems, regardless of size, are affected by § 210 of Title II, which establishes the cogeneration and small power production program.

SUMMARY OF ARGUMENT

The limitations which the Constitution puts on the federal commerce power are of two kinds. The first is imposed by the Commerce Clause itself; under that provision, only activities which substantially affect interstate commerce are subject to the commerce power. The second kind of restriction is imposed by other provisions of the Constitution, such as the Fifth, Sixth, and Tenth Amendments. Under this type of limitation, even activities which substantially affect interstate commerce are beyond the reach of the commerce power.

The ultimate issue in the present case—whether the Commerce Clause and the Tenth Amendment permit the federal government to displace state policies regarding ratemaking for retail sales of electricity and natural gas and to regulate states and local governments engaged in the power business—has never before been specifically addressed by this Court. But the question of the relative constitutional powers of the states and the federal government to regulate retail sales of electricity and natural gas came before this Court a number of times in different contexts before the enactment of the Federal Power Act

of 1935 and the Natural Gas Act of 1938. Now this subject is again before the Court as a result of PURPA.

Title I of PURPA concerns retail sales of electricity, § 210 of Title II deals with cogeneration and small power production, and Title III relates to retail sales of natural gas. PURPA was designed by Congress to be implemented primarily by the entity exercising retail regulatory authority over the utility. Most investor-owned utilities are subject to regulation by state utility commissions, and most local public power systems are regulated by the governmental agencies which run them. Therefore, in imposing obligations on the retail rate regulatory authority, Congress specified that the authority would be the appropriate state commission for regulated utilities, and, with respect to so-called "nonregulated" utilities, *i.e.*, public power systems owned by political subdivisions of states or by cooperatives, the authority would be the governing body to which the utility is responsible.

Various federal policies and standards for retail electric rates are prescribed in Title I.[2] State regulatory authorities and nonregulated utilities must, after notice and hearing, determine with respect to each standard whether or not it is appropriate to implement that standard in order to carry out the federal policies prescribed in the Act.[3] The Act provides that nothing therein prohibits any state regulatory authority or nonregulated electric utility from making a determination that it is not appropriate to implement or adopt any such standard.[4] This provision, however, is nothing more than the proverbial velvet glove hiding the iron fist: the Act goes on to provide that such determinations must be based on evidence and supported

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[2] §§ 2, 101, 111(d), 113(b).

[3] §§ 111(a), (b), 113(a).

[4] § 111(a).

by findings and reasons,[5] and are subject to judicial review in the federal courts.[6] Virtually anyone has standing to appeal a determination not to implement or adopt a federal standard. The states and their political subdivisions are not free to reject certain of the federal standards because they contravene state policy; they may reject these standards only if they can establish, by evidence, reasons and findings, that the federal standards are not appropriate to carry out the federal policies specified in PURPA or that the standards violate state law.[7] Moreover, the states and their political subdivisions are not even left with discretion to determine the manner in which the federal standards are to be evaluated; PURPA prescribes the criteria which the state regulatory authorities and nonregulated utilities must use in determining whether or not the federal standards are appropriate to carry out the policies of the Act.[8] The financial burden imposed on the states and their political subdivisions is substantial.

Title II of PURPA requires in § 210 that state regulatory authorities and nonregulated utilities, after notice and hearing, implement federal rules for cogeneration and small production facilities.[9]

Title III, which concerns retail sales of natural gas, requires state regulatory authorities and nonregulated utilities, after notice and hearing, to determine whether adoption of the federal standards contained in that title is appropriate to carry out the federal policies therein.[10] The criteria to be used in determining whether or not the

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[5] §§111(c), 113(a).

[6] §123(c).

[7] § 113(b).

[8] § 115.

[9] § 210(f).

[10] § 303(a).

standards are appropriate to carry out the federal policies are prescribed by Title III.[11]

It is the position of APPA (i) that retail sales of electricity and natural gas are beyond the reach of the federal commerce power because such sales do not affect interstate commerce in the constitutional sense; and (ii) that, even if retail sales of electricity and natural gas do affect interstate commerce, federal regulation of such sales is prohibited by the Tenth Amendment.

1.

Regardless of what might be hypothesized about the theoretical effects of retail sales of electricity and gas on interstate commerce, the fact is that the decisions of this Court to date and the consistent premises of all prior federal legislation (*e.g.*, the Federal Power Act and the Natural Gas Act) exclude retail sales from the reach of the commerce power; and the legislative history of PURPA does not contain a rational basis for a contrary conclusion.

In enacting the Federal Power Act of 1935 and the Natural Gas Act of 1938, Congress excluded retail sales of electricity and natural gas from federal jurisdiction as a result of a series of decisions by this Court involving the Commerce Clause. These decisions rejected the contention that retail sales of electricity and natural gas are in interstate commerce, and established that such sales are in intrastate commerce even where the electricity or gas has crossed state lines.

Activities which are wholly intrastate are subject to the commerce power only if they have a "substantial" effect on interstate commerce. If, as in the case of PURPA, Congress has determined that a particular activity affects interstate commerce, there must be a rational basis for such

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[11] § 304.

a determination, and the means chosen by Congress to regulate the activity must be reasonably adapted to the end permitted by the Constitution.

There is no finding in PURPA that retail sales of electricity and natural gas substantially affect interstate commerce, and the legislative history of the Act contains little evidence to support such a conclusion. Indeed, the legislative history evidences an almost total disregard of the limitation which the Commerce Clause puts on the federal commerce power.

The legislative history reveals that Congress justified PURPA, not as an exercise of the commerce power, but as a measure necessary to alleviate the energy crisis and to discourage what Congress viewed as harmful competition among states to attract industrial growth through the structuring of retail rates. Yet the testimony fails to establish that federal regulation is better adapted than state regulation to achieve either of these objectives.

2.

With respect to the limitation which the Tenth Amendment imposes on the commerce power, this Court has held that the federal government may not regulate the "States as States" so as to impair attributes of state sovereignty and displace state policy with respect to traditional governmental functions. PURPA does just that. It directly regulates retail sales by political subdivisions of the states, *i.e.*, "nonregulated utilities," and it tells the states how to regulate retail sales by investor-owned utilities. The states and their political subdivisions are (i) compelled by PURPA to adopt federal policies for retail ratemaking, (ii) in effect compelled to adopt federal standards designed to implement those policies, (iii) compelled to expend state and local funds, and (iv) compelled to adopt burdensome procedures for reporting and rate determination.

The right to regulate retail sales of electricity and natural gas is an attribute of state sovereignty. Such sales touch

the lives of virtually every citizen of every state, directly affecting their health and welfare, which are entrusted by the Constitution to the care of the states and their political subdivisions.

Finally, PURPA displaces state policy with respect to retail ratemaking—a traditional function of state and local governments. Under PURPA, the states and their political subdivisions are required to consider federal standards and to adopt certain standards unless it is determined that the standards are not appropriate to carry out the policies of PURPA. States and their political subdivisions can depart from these standards only when doing so would be appropriate to carry out the federal policies set forth in the Act. In other words, the states and their political subdivisions may not refuse to adopt the federal policies established by PURPA; they may only determine whether the standards in PURPA are appropriate to carry out those policies. PURPA thus constitutes a wholesale substitution of federal policies for state and local policies in an area that has traditionally been subject exclusively to the police power of the states.

ARGUMENT

I. Retail Sales Of Electricity And Natural Gas To Local Consumers Do Not Affect Interstate Commerce In The Constitutional Sense

It is well established that an activity need not be a part of interstate commerce to be within the reach of the federal commerce power; even intrastate activity will be subject to federal jurisdiction under the Commerce Clause if such activity affects interstate commerce. *See, e.g., Fry* v. *United States*, 421 U.S. 542 (1975).

Of course, in the scientific or technological sense, *any* activity may be said to ultimately affect interstate commerce to some degree. Viewed in this light, the local use of electricity, even by a single consumer, has *some* effect on interstate commerce, even if the electricity is generated in the state in which it is consumed and is never commingled

with electricity transmitted from another state. But, if such a literal reading of the word "affect" were to determine the reach of the federal commerce power, there would be no limit to that power other than the will of Congress. No activity of any kind would be beyond the reach of federal regulation. While some writers have speculated that there may, as a practical matter, be no limit to the commerce power,[12] this Court has never so held. As the Court has said on numerous occasions:

> "[I]t is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."[13] *State Tax on Railway Gross Receipts*, 15 Wall. (82 U.S.) 284, at 293 (1873).

The first case in which this Court had occasion to rule on the extent of the federal commerce power was *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1 (1824), in which a state steamboat monopoly law was found to be in conflict with an act of Congress authorizing vessels to navigate coastal waters. In upholding the validity of the federal statute under the commerce power, Chief Justice Marshall described that power in the following terms:

> "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.*, at 196.

More than a century later, this Court referred to Chief Justice Marshall's description of the federal commerce power as being "with a breadth never yet exceeded." *Wickard* v. *Filburn*, 317 U.S. 111, 120 (1942). However, even Chief Justice Marshall recognized that the commerce

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[12] *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, at 24 (1959).

[13] The comment is made most often with respect to the effect of state activity on interstate commerce. However, it applies with equal force to the activities of private individuals.

power has limits which are imposed by the Commerce Clause itself. In saying that the power "acknowledges no limitations," he meant that the power as applied to its proper subject matter, *i.e.*, "Commerce . . . among the several States," has no limitations. Thus, in *Gibbons* v. *Ogden*, he qualified his description of the commerce power in the following terms:

> "If, as has always been understood, the sovereignty of Congress, *though limited to specified objects, is plenary as to those objects*, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States (emphasis added)." 9 Wheat. (22 U.S.), at 197.

Chief Justice Marshall dealt at some length with the definitions of the word "commerce" and the phrase "among the several States," and concluded that "completely internal" concerns of a state were not subject to the federal commerce power, but that "those internal concerns which affect the States generally" were within the reach of the Commerce Clause. *Id.*, at 189-196.

This notion of unlimited power within a limited sphere appears in a different context in Chief Justice Marshall's opinion in *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819):

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action." *Id.*, at 405.

Chief Justice Marshall's concept of federal power as plenary within a limited sphere reflects the thoughts of James Madison, who, although one of the most ardent federalists among the Framers, wrote:

> "[T]he State governments could have little to apprehend, because it is only within a certain sphere that the

federal power can, in the nature of things, be advantageously aministered." THE FEDERALIST No. 46 (J. Madison).

The text of the Commerce Clause left open to the Court broad opportunities for construction, and the Court's interpretation of that constitutional provision has taken various forms since Chief Justice Marshall's opinion in *Gibbons* v. *Ogden*. The Court, however, has continued to be sensitive to the fact that the Commerce Clause itself puts limits on the federal commerce power. This sensitivity has been articulated in various ways over the years, reflecting the different judicial formulae which have been used by the Court to construe the Commerce Clause.

In the period preceding the enactment of the Federal Power Act and the Natural Gas Act, the Court's decisions interpreted the limitations inherent in the Commerce Clause in terms of whether the activity in question was in interstate or intrastate commerce, and whether it imposed a direct or an indirect burden on interstate commerce. During this period, the Court decided a series of cases in which utility companies challenged the authority of the states to regulate certain transmissions and sales of electricity and natural gas. The companies alleged that state regulation of these activities violated the Commerce Clause because the activities in question were part of, or imposed a direct burden upon, interstate commerce. The decisions of this Court upheld state regulation of retail sales, and established that such sales (i) are not in interstate commerce, (ii) do not impose a direct or significant burden on interstate commerce, and (iii) are within the exclusive jurisdiction of the states.

The first case in this series of decisions was *Public Utilities Commission* v. *Landon*, 249 U.S. 236 (1919). There, this Court held that retail sales of natural gas produced in another state were sales in intrastate commerce, even though the mains of the local companies which distributed the gas to consumers were connected permanently with those of the company which transported the gas into the

state. In holding that interstate commerce ended when the gas entered local mains, this Court said:

> "That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that, as part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state. . . .
>
> "But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner tips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce, and then disposed thereof at retail in due course of their own local business." *Id.*, at 245.

In the *Landon* case, the company that sold the gas at retail to consumers was not the company that had transported the gas across state lines. The question of whether the federal commerce power attaches to retail sales of gas by a company which has transported the gas across state lines was first addressed by this Court in *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23 (1920). There, the company transmitted natural gas by pipeline from the source of supply in Pennsylvania to the point of distribution in New York, where the company subdivided the gas and sold it at retail to local consumers. The Court held that the transmission and sale of natural gas produced in one state, transported by pipelines, and directly furnished to consumers in another state, was interstate commerce. The Court nevertheless held that the retail sales in question could be regulated by the state in the absence of federal regulation, because such sales were "essentially local in nature" and did not require uniform regulation by congressional action. *Id.*, at 30-31.

In *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924), the Court was presented with the question of whether the sale and delivery of natural gas to distributing companies for resale is interstate commerce.

The gas was transported from Oklahoma and Kansas to Missouri, where it was sold to distributing companies. In holding that these wholesale sales were in interstate commerce and not subject to state jurisdiction, the Court said:

> "With the delivery of the gas [transported from one state to another] to the distributing companies . . . the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. . . . In such case the effect on interstate commerce, if there be any, is indirect and incidental . . . . The business of supplying, on demand, local consumers 'is a local business, even though the gas be brought from another state' and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance." *Id.*, at 308-309.

The Court's statement not only reaffirmed the *Landon* holding that retail sales are not in interstate commerce, but indicated unequivocally that, in the Court's view, such sales did not have a substantial effect on interstate commerce.

The test for delineating the spheres of federal and state jurisdiction with respect to natural gas sales that was established by the Court in the *Landon* case and readopted in the *Kansas Natural Gas Co.* case was made applicable to sales of electricity in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89 (1927).

The apparent inconsistency between the decisions in the *Landon* and *Kansas Natural Gas Co.* decisions and the *Pennsylvania Gas Co.* decision was noted by the Court in *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 465 (1931). Unlike the other cases, which involved state regulatory powers, the *East Ohio Gas Co.* case involved the state taxing power. At issue was the lawfulness of an Ohio excise tax which had been imposed on a company that sold gas at retail to consumers in Ohio. As in the *Pennsylvania*

Gas Co. case, the company which sold the gas at retail to consumers was the company that had transported the gas across state lines. In upholding the tax, the Court said:

> "[T]he furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State." *Id.*, at 471.

The party challenging the validity of the tax relied on the *Pennsylvania Gas Co.* case, which had held that retail sales of gas by a company which had transported the gas across state lines were in interstate commerce. The Court disapproved that case in the following terms:

> "There the question was whether the New York commission had jurisdiction to prescribe the rates to be charged local consumers of gas transported to that State from Pennsylvania. This court, following the findings of the highest court of New York . . . , held that the entire movement of the gas was interstate commerce . . . . The theory on which that conclusion was reached is not wholly consistent with the views expressed in *Public Utilities Comm.* v. *Landon* . . . and in *Missouri* v. *Kansas Gas Co.* . . . It does not appear that there were presented, in *Pennsylvania Gas Co.* v *.Public Serv. Comm.*, to the state court or here the considerations on which it is held that interstate commerce ends and intrastate business begins when gas flowing through pipe lines from outside the State passes into local distribution systems for delivery to consumers in the municipalities served. But however that may be, the opinion in that case must be disapproved to the extent that it is in conflict with our decision here." *Id.*, at 471-472.

As a result of this Court's determination in the *Kansas Natural Gas Co.* and *Attleboro* cases that the states lacked constitutional authority to regulate certain transmissions and sales of electricity and natural gas, Congress enacted the Federal Power Act in 1935 and the Natural Gas Act in 1938. Both statutes provided for federal regulation of

those matters which, under the doctrine developed by the decisions discussed above, could not be regulated by the states. More importantly for the present case, both statutes expressly withheld retail sales to local consumers from federal jurisdiction, in deference to that doctrine. The relationship of the *Landon, Kansas Natural Gas Co.*, and *Attleboro* decisions to the exemption of retail sales from federal jurisdiction under the Federal Power Act and Natural Gas Act was described by the Court in *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964):

> "In decisions over the past quarter century we have held that Congress, in enacting the Federal Power Act and the Natural Gas Act, apportioned regulatory power between state and federal governments according to a test which this Court had developed in a series of cases under the Commerce Clause. The Natural Gas Act grew out of the same judicial history as did the part of the Federal Power Act with which we are here concerned....
>
> "The test adopted by Congress was developed in a line of decisions beginning with *Public Utilities Comm'n* v. *Landon* . . . and *Pennsylvania Gas Co.* v. *Public Service Comm'n* . . . . In those cases this Court held that the Commerce Clause does not prohibit a State from regulating the sale of gas directly to consumers even though the gas be drawn from interstate mains. *Missouri* v. *Kansas Gas Co.*... sketched in the other side of the picture by holding that a State is prohibited from regulating the rate at which gas from out-of-state is sold to independent distributing companies for resale to local consumers. The last decision in this line, and the one which directly led to congressional intervention, was *Public Utilities Comm'n* v. *Attleboro Steam & Elec. Co.*... . There the Public Utilities Commission of Rhode Island asserted jurisdiction over the rates at which a Rhode Island company sold energy generated at its Rhode Island plant to a Massachusetts company, which took delivery at the state line for resale to the City of Attleboro. The Court held that *Kansas Gas, supra*, controlled, that the case did not involve 'a regulation of the rates charged to local consumers,' and that since the sale was of concern to both Rhode Island and Massachusetts it was 'national in

character.' Consequently, 'if such regulation is required it can only be attained by the exercise of the power vested in Congress.' " *Id.*, at 211-213.

Thus, in interpreting the commerce power as it applies to the transmission and sale of electricity and natural gas, this Court has repeatedly construed the limitations inherent in the Commerce Clause to place retail sales of electricity and natural gas within the jurisdiction of the states. This Court's decisions in this regard have been followed by the lower coutrs and by the state courts and commissions.[14]

It is true that these cases did not expressly hold that retail sales are beyond the reach of the federal commerce power. This is because the cases arose in the context of challenges to state, not federal, authority. However, the conclusion that retail sales are not within the ambit of the Commerce Clause is necessarily implicit in the holdings of these cases, viewed in light of the test which the Court applied to determine the extent of the commerce power. In *Landon*, the Court held that retail sales by a local distributor were not in interstate commerce and were therefore subject to state jurisdiction. Presumably, if the Court thought that such sales were also within the reach of the federal commerce power, it would have held that they were in interstate commerce, but could nevertheless be regulated by the states until the federal government acted to preempt the states. This is precisely what the Court held in the *Pennsylvania Gas Co.* case with respect to retail sales by a company that had transported the gas across state lines;

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[14] *E.g.*, *South Carolina Power Co.* v. *South Carolina Tax Commission*, 60 F.2d 528 (E.D.S.C. 1932), *affirmed Broad River Power Co.* v. *Query*, 288 U.S. 178 (1933); *South Carolina Power Co.* v. *South Carolina Tax Commission*, 52 F.2d 515 (E.D.S.C. 1931), *affirmed* 286 U.S. 525 (1932); *West Virginia and Maryland Gas Co.* v. *Towers*, 134 Md. 137, 106 Atl. 265 (1919); *State* v. *Flannelly*, 96 Kan. 372, 152 Pac. 22 (1915); *Re Appalachian Power Co.*, PUR 1919D, 286 (W. Va. P.S.C. 1919); *Washington Water Power Co.* v. *Montana Power Co.*, PUR 1916E, 144 (Idaho P.U.C. 1916).

and this is what the Appellants in the present case argue with respect to all retail sales of electricity and natural gas.[15] But this is not what the *Landon* case held, and this view of retail sales as being in interstate commerce and subject to preemption was repudiated by the Court's readoption of the *Landon* reasoning in the *Kansas Natural Gas Co.* and *East Ohio Gas Co.* cases. These cases would appear to confirm that retail sales of electricity and natural gas are not subject to the dual sovereignty of the states and the federal government, but are subject to the exclusive authority of the states.

Furthermore, while the Court has not expressly held that retail sales of electricity and natural gas are beyond the reach of the federal commerce power, it has nevertheless stated unequivocally that such sales are within the exclusive jurisdiction of the states. In *East Ohio Gas Co.* v. *Tax Commission, supra,* it said that retail sales are "exclusively within the jurisdiction of the state," 283 U.S., at 471, and in *Federal Power Commission* v. *East Ohio Gas Co.,* 338 U.S. 464 (1950), the Court said that its decisions prior to the Natural Gas Act made clear that "the State alone" can regulate retail sales. *Id.,* at 470.

More recently, the restrictions which the Commerce Clause puts on the federal commerce power have been articulated in terms of the requirement that the effect on interstate commerce be "substantial." *See, e.g., Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, at 258 (1964) (". . . the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce . . ."); *Wickard* v. *Filburn,* 317 U.S. 111, at 125 (1942) (". . . even if appellee's activity

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[15] The Solicitor General's brief contends that:

". . . Congress could have preempted the states completely in the regulation of retail sales by utilities of electricity and natural gas, and in the regulation of transactions between utilities and cogenerators." Brief for the Appellants, at 27-28.

be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . ."); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, at 119 (1942) (". . . the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power . . .").

Furthermore, in cases such as the present one, where a federal statute declares or assumes that a particular activity substantially affects interstate commerce, there must be a rational basis for such a conclusion. *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, —— U.S. ——, 49 U.S.L.W. 4654, at 4656 (1981); *Katzenbach* v. *McClung*, 379 U.S. 294, at 303-304 (1964); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 341, at 258, 262 (1964). Also, the means chosen by Congress must be reasonably adapted to the end permitted by the Constitution. *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc., supra*, at 4647; *Katzenbach* v. *McClung, supra*, at 304; *Heart of Atlanta Motel* v. *United States, supra*, at 262.

A court might hypothesize all sorts of theoretical effects of retail sales of electricity and natural gas on interstate commerce. However, the decisions of this Court indicate that, where Congress has assumed an effect on interstate commerce, hypothesis is not enough; there must be a rational basis for that assumption in the legislative history of the statute in question. It is submitted that the legislative history of PURPA does not contain any apparent rational basis for the conclusion that retail sales of electricity and gas have a substantial effect on interstate commerce. PURPA was enacted after 18 months of hearings, which began with a proposal, submitted by the Carter Administration, calling for a national rate reform program.[16] Not-

[16] Communication from the President of the United States, National Energy Act, H.R. Doc. 95-138, 95th Cong., 1st Sess. (1977).

withstanding the considerable amount of testimony on various aspects of the bills which finally culminated in PURPA, there was no specific testimony—other than an occasional bald assertion—that retail sales of electricity and gas substantially affect interstate commerce. That Congress assumed such an effect is clear, since § 2 ("Findings") of PURPA states that the programs set forth in the Act are required by, among other things, "the proper exercise of congressional authority under the Constitution to regulate interstate commerce . . . ." However, this assumption was never expressly verified by Congress.

Typical of the short shrift given constitutional considerations by the Congress is the following statement by one of PURPA's leading proponents in the Senate, made in response to the suggestion of a witness that the Act would intrude excessively into traditional state functions:

> "I would like to make a point, too, Mr. Chairman: It is fine for him to sit here, but I would like to let him read the mail from the people back home who can't pay their electric bills. They aren't discussing the niceties of the Federal Constitution or the niceties of the Federal-State regulatory scheme. . . . So we've been up that street, that the Federal Government can't do anything. And the states have been talking about regulatory reform since the days of the Salem witch trials and haven't done much by way of progress. And I think it is time we took some action." *Public Utility Rate Proposals of President Carter's Energy Program: Hearings on S. 122 et al., before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources*, 95th Cong., 1st Sess. (Part I), at 332 (1977) (hereinafter "Public Utility Rate Proposals Hearings").

The legislative history of PURPA reveals that the Act was justified as a necessary means of dealing with an energy crisis which had assumed the proportions of a na-

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The legislation was introduced in the House, H.R. 6831, 95th Cong., 1st Sess. (1977), and the Senate, S. 1469, 95th Cong., 1st Sess. (1977).

tional emergency, and with the related problem of interstate competition for industrial growth—a phenomenon which Congress viewed as encouraging inefficient use of energy and inequitable rates to residential consumers. The sporadic references to "interstate commerce" which appear in the legislative history occur in the context of testimony concerning these two problems, which PURPA was intended to cure. For example, one witness stated that:

> "[T]he problem that the President seeks to address is national in scope, for it is the problem of inefficiency; and wherever it exists it affects interstate commerce, whether it be due to the inefficient use of finite capital or natural resources or to the perpetuation and promotion of perverse interstate competition for industrial expansion." *National Energy Act: House Hearings on H.R. 6831 et al., before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce,* 95th Cong., 1st Sess (Part 3.2), at 833 (1977).

No explanation o relaboration of this alleged effect on interstate commerce was offered, however.

This Court has repeatedly indicated that mere assertions by Congress that a particular activity affects interstate commerce will not suffice to invoke the federal commerce power; the Court will look to the legislative history to determine if such assertions have a rational basis. *See, e.g., Katzenbach* v. *McClung, supra,* at 303. If an unsupported assertion by Congress that an activity affects interstate commerce is not sufficient to invoke the Commerce Clause, then, *a fortiori,* unsupported statements to the same effect by witnesses testifying before Congress are equally insufficient.

The absence of a rational basis for the proposition that retail sales of electricity and natural gas substantially affect interstate commerce may be appreciated by comparing the legislative history of PURPA with the legislative histories of other recent statutes enacted under the commerce power,

such as the Powerplant and Industrial Fuel Use Act, Pub. L. No. 95-620.[17]

Moreover, assuming that the energy crisis and interstate competition for industrial growth are proper objects of the commerce power, the legislative history of PURPA does not support the proposition that federal regulation of retail sales of electricity and gas would alleviate the energy crisis, or that retail rate regulation would affect the location of industry. To the contrary, the testimony on balance indicated that the displacement of state policies by federal policies would compound problems which have contributed to the energy crisis, and that retail sales of power do not substantially influence industrial location, except for a few energy-intensive industries.[18]

We respectfully submit that, in view of the *Landon* case and its progeny, and the heretofore consistent exclusion by Congress of retail sales from federal jurisdiction, something more should be required in terms of a rational basis for Congress' assumption that retail rates susbtantially affect interstate commerce, and a demonstration that the federal regulatory scheme of the Act is reasonably adapted to solve the interstate problems which Congress used to justify the enactment of PURPA.

II. The Tenth Amendment Precludes The Federal Government From Displacing State Policies With Respect To Ratemaking For Retail Sales Of Electricity, And Regulating States Or Their Political Subdivisions Engaged In The Distribution Of Electricity And Natural Gas To Local Consumers

In addition to the limitations which the Commerce Clause itself imposes on the federal commerce power, limitations on that power result from other provisions of the Consti-

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[17] *See, e.g.*, S. Rep. No. 95-361, 95th Cong., 1st Cong., at 30-35 (1977); H. Rep. No. 95-496, Part IV, 95th Cong., 1st Sess., at 3, 16, 90-100 (1977).

[18] *See, e.g.*, Public Utility Rate Proposals Hearings, at 311-801.

tution such as the Due Process Clause of the Fifth Amendment, *Leary* v. *United States*, 395 U.S. 6 (1969), the right to trial by jury contained in the Sixth Amendment, *United States* v. *Jackson*, 390 U.S. 570 (1968), and the rights reserved to the states by the Tenth Amendment, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Even if an activity is otherwise within the reach of the commerce power, *i.e.*, if it is found to affect interstate commerce in the constitutional sense, federal regulation of the activity will be precluded to the extent that such regulation impairs rights guaranteed to the states or the people by the Constitution.

This Court has repeatedly indicated that the limitations which the Tenth Amendment imposes on the commerce power are necessary to the preservation of the dual system of government on which the Constitution is premised. Thus, in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), in applying the distinction between direct and indirect effects on commerce, the Court said:

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government." 295 U.S., at 546.

Justice Cardozo, in his concurring opinion in the *Schechter* case, expressed the same concern in different terms:

> "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the centre. A society such as ours 'is an elastic medium which transmits all tremors through its territory; the only question is of their size.' . . . The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant reper-

> cussions. What is near and what is distant may at times be uncertain. . . . There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our Federal system." *Id.*, at 554.

In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which has been described as "[t]he case in which the Court reduced the distinction between 'direct' and 'indirect' effects to the vanishing point,"[19] this Court, in upholding the National Labor Relations Act of 1935, said of the commerce power:

> "That the power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' " 301 U.S., at 37.

However, the Court was careful to qualify its statement that the commerce power is "plenary" by noting that limitations on that power are necessary:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. . . . The question is necessarily one of degree." *Ibid.*

Thus, where Chief Justice Marshall had used the limitations inherent in the Commerce Clause to qualify the "plenary" nature of the commerce power, the Court in the *Jones & Laughlin* case used the concept of states' rights.

Even in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), which constitutes one of the Court's broadest interpretations of

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[19] CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION at 174 (1973).

the Commerce Clause, the Court acknowledged that the dual system of government necessitates limits on the commerce power:

> "This Court has always recognized that the power to regulate commerce, though broad indeed, has limits.... The Court has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity (footnote omitted).'" *Id.*, at 196.

The limits which the Tenth Amendment puts on the federal commerce power have been brought into focus by two recent decisions of this Court. The first of these decisions was *National League of Cities* v. *Usery, supra*, wherein the Court invalidated the 1974 amendments to the Fair Labor Standards Act. These amendments extended the statutory minimum wage and maximum hours provisions of the act to employees of states and their political subdivisions. The Court drew a distinction between federal regulation of private persons and businesses "necessarily subject to the dual sovereignty of the government and the Nation and of the States in which they reside," and federal regulation "directed not to private citizens, but to States as States." 426 U.S., at 845. It found that the challenged amendments constituted regulation of the latter kind, and that the power to set the wages and work hours of state employees was "an undoubted attribute of state sovereignty." *Ibid.* It then held that ". . . insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.*, at 852.

The Court recently elaborated on the holding and reasoning of the *National League of Cities* case in *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, There, the Court upheld the Surface Mining Reclamation Act of 1977 against a claim that Congress, in adopting the act, had exceeded its powers under the Commerce Clause

and had transgressed affirmative limitations on that power contained in the Fifth and Tenth Amendments. The lower court had rejected the plaintiffs' Commerce Clause and Fifth Amendment challenges to the act, but had held on the basis of *National League of Cities* that certain provisions of the act violated the Tenth Amendment because they interfered with the states' "traditionally governmental function" of regulating land use. 483 F.Supp., at 432. Because the lower court's opinion indicated an apparent misunderstanding of the reasoning in the *National League of Cities* case, this Court, in reversing the lower court, discussed the *National League of Cities* case at some length. It articulated the Tenth Amendment limitation on the commerce power in terms of three requirements:

> "It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' *Id.*, at 854. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *Id.*, at 852 (footnote omitted)." 49 U.S.L.W., at 4660.

The Court then determined that the Surface Mining Act did not regulate "States as States," and on that basis concluded that the act did not violate the Tenth Amendment. The Court's determination that the act did not regulate "States as States" turned on findings that (i) the act ultimately regulated the activities of private individuals and businesses, which were subject to federal regulation under the Commerce Clause, (ii) the states were not compelled to enforce the federal standards, and (iii) the states were not compelled to expend any state funds or to participate in the federal regulatory program in any manner whatsoever. 49 U.S.L.W., at 4660. On the basis of these findings,

the Court concluded that "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Ibid.*

Having determined that the Surface Mining Act did not regulate "States as States," the Court in the *Virginia Surface Mining* case did not reach the question of whether the act regulated attributes of state sovereignty or whether it impaired the states' ability to structure integral operations in areas of traditional functions.

In the present case, it seems clear, at least with respect to utilities owned by states or their political subdivisions, that PURPA regulates "States as States." Such utilities are required by PURPA to adopt the federal policies set forth in the Act and to determine, in the manner specified in the Act, whether the federal standards contained in the Act will carry out those policies.[20] Any decision by utilities which are owned by political subdivisions of states not to implement or adopt the Act's standards must be supported by reasons, and such a decision with respect to certain of the standards must be based on evidence and findings.[21] Moreover, virtually anyone, including the Secretary of Energy, may seek judicial review in the federal courts of a determination not to implement or adopt certain of the standards contained in PURPA.[22] Should the reviewing court determine that the reasons for the challenged determination or the evidence and findings on which it is based do not justify a decision not to implement the federal standards, the determination would presumably be reversed, and the standards would become obligatory on the political subdivision.[23] In short, PURPA compels the states' polit-

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[20] §§ 111(a), 113(b), 303(a).

[21] §§ 111(b), 113(c), 303(c).

[22] §§ 122, 123(c).

[23] Section 123(c) confers upon the federal courts "jurisdiction to grant appropriate relief."

ical subdivisions to adopt federal standards to the extent that those standards would carry out the federal policies set forth in the Act.

Any notion that PURPA does not in effect compel the political subdivisions of states to adopt federal standards is dispelled by an examination of the legislative history. For example, with respect to the Act's requirement that any nonregulated utility which decides not to adopt the federal standards shall report its decision and the reasons therefor to the Secretary of Energy, the sponsor of this provision stated:

> "This not only provides Congress with the information but it also provides, at least my intent is, pressure on those State commissions to do the job they are supposed to do." 123 Cong. Rec., at 32411 (1977).

Another Senator stated the matter more bluntly:

> "From these reports it appears it is the intent of the author of the amendment to give the Federal authorities sort of a gun they can point at the head of the local regulatory agencies and say, 'You either do these things or we, Uncle Sam, will move in and take over for you....'" *Ibid.*

With respect to cogeneration and small power production, PURPA requires nonregulated utilities to adopt rules prescribed by the Federal Energy Regulatory Commission. Even if such utilities determine, after notice and hearing, that such rules are not appropriate to carry out the purposes of the Act, they may not decline to adopt them. PURPA does not even purport to give nonregulated utilities a choice in the matter.

PURPA also requires substantial expenditures of municipal funds to implement its policies and standards. The Act requires nonregulated utilities to hold hearings, to prepare decisions, and to submit reports. APPA surveyed its members in the spring of 1981 and discovered that thirty responding systems had already spent $2,122,000 to comply

with §§ 111, 113, 114 and 116. Twenty-seven systems estimated that they would incur expenses in 1981 amounting to $1,630,000 to comply with the same sections. Development of the information required by § 133 had cost twenty-six systems $5,098,000 to date and they anticipated that compliance with that section would cost $11,147,874 over the next five years.

The provisions of PURPA which require the political subdivisions of states to adopt federal policies and standards and to expend local funds apply equally to the state regulatory authorities.

Turning now to the question of whether the matters regulated by PURPA are attributes of state sovereignty: regulation of retail sales of electricity and natural gas is unquestionably a traditional function of states and their political subdivisions; almost from its inception, gas and electric service has been regulated by states and municipalities.[24]

However, regulation of retail sales is more than a traditional function of state government; it is one of the most important of the so-called "police powers" exercised by the states. The importance of this power results from the importance of the subject regulated; virtually every citizen of every state depends on electricity and gas for light and heating. Unlike the strip mining activity involved in the *Virginia Surface Mining* case, retail sales of electricity and natural gas directly and substantially affect every citizen of every state daily.

This Court has repeatedly acknowledged the vital interest that states have in the regulation of retail sales, and the care with which Congress has heretofore avoided intrusion into this traditional exercise of the states' police powers. For example, in *Panhandle Eastern Pipe Line Co.* v. *Public*

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[24] For a compilation of early state statutes regulating the retail sale of electricity and natural gas, *see* V. Lindsley, *Rate Regulation of Gas and Electric Lighting*, at 58 *et seq.*, (1906).

Service Commission, 332 U.S. 507 (1947), the Court said:

> "Congress' action [in enacting the Natural Gas Act] moreover was an unequivocal recognition of the vital interests of the states and their people, consumers and industry alike, in the regulation of rates and service. . . .
>
> "These considerations all would lead to the conclusion that the states are not made powerless to regulate the sales in question by any supposed necessity for uniform national regulation but that on the contrary the matter is of such high local import as to justify their control, even if Congress had remained wholly silent and given no indication of its intent that state regulation should be effective. . . ." *Id.*, at 521, 523-524.[25]

It is true that the states will not cease to exist as independent governmental entities if they are denied the right to regulate retail sales, any more than they would have ceased to exist as such if the Court in *National League of Cities* had denied them the right to determine the wages paid their employees. However, the right and obligation to provide for the health, safety, and welfare of the people are unquestionably attributes of state sovereignty. And the power to regulate retail sales of electricity and natural gas—like fire prevention, police protection, and education—is an essential aspect of that right and obligation.

Finally, it appears clear beyond peradventure that PURPA, whatever else it does or does not do, operates directly to displace the states' freedom to structure integral operations in an area of traditional governmental functions. The Act implies that the federal standards need

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[25] *See also Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, at 212-215 (1964); *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, at 690 (1947); *Connecticut Power & Light Co.* v. *Federal Power Commission*, 324 U.S. 515, at 525-529 (1945); *Federal Power Commission* v. *Hope Natural Gas Co.*, 331 U.S. 682, at 690 (1944); *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U.S. 456, at 467 (1943).

[26] §§ 111(a), 113(b), 303(a).

not be adopted if it is determined that they are inconsistent with state law,[26] but this is a far different thing than saying that the federal standards need not be adopted if they are in conflict with state policies; not every state regulatory policy is or can be enacted as law. Moreover, there is nothing in the Act which provides that the policies set forth therein—as distinguished from the standards—may be disregarded by the states and their political subdivisions. Thus, while the Act purports to give the states and their political subdivisions some discretion in adopting federal standards, it gives them no discretion in adopting federal policies.

To summarize: with respect to nonregulated utilities, PURPA ultimately regulates the political subdivisions of states which own and operate such utilities. It compels those political subdivisions, as well as state regulatory authorities, to adopt federal standards and expend funds to implement federal policies. PURPA thus regulates "States as States." Because of the relationship that retail sales of electricity and natural gas bears to the health, safety, and welfare of the state, and the long tradition of state regulation of those sales, such regulation is an attribute of state sovereignty. Finally, the Act unquestionably displaces the states' freedom to establish the policies which govern retail sales of electricity and natural gas. PURPA thus transgresses the Tenth Amendment limitation on the federal commerce power.

CONCLUSION

Writing in 1937, at the eclipse of a period during which the Court had severely restricted the federal commerce power in favor of states' rights, a noted constitutional scholar observed:

> "From the assembling of the Constitutional Convention until the latest relevant decision, there has been a struggle over the division of powers between the states and the nation."[27]

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[27] F. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE, at 240 (1937).

Almost half a century later, this observation remains valid, as the struggle between federal and state jurisdiction continues.

In the present case, we believe that the Constitution, as interpreted by prior decisions of this Court, as well as the national interest, require that retail sales of electricity and natural gas be left to the exclusive jurisdiction of the states, and that the judgment of the district court be affirmed.

Respectfully submitted,

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.*
KIRK HOWARD BETTS
Watergate 600 Building
Washington, D.C. 20037
(202) 342-0800

Attorneys for Amicus Curiae

*Counsel of Record

ALAN H. RICHARDSON
American Public Power Association
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 342-7200

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